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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1904

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL 618, *Petitioners,*

v.

NORANDA ALUMINUM, INC., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

I.

Respondent agrees that "there is no question that this Court's established principles demand apportionment among 'causes' " (Resp. Br. 6). He seeks to avoid review and reversal of this error of law by claiming that "the facts summarily set out below show that there is no need here to define the precise scope

of the apportionment doctrine for the plain reason that the principles of apportionment are not applicable here" (*id.*) The short and conclusive answer to respondent's characterization of the facts is the Court of Appeals' determination that "[p]erhaps some of this delay was occasioned by inefficient labor and *certainly* some was occasioned by the 3-day laborers' strike * * *" (Pet. 9a, emphasis added, quoted at Pet. 13-14).

Thus, the assertion that "both the trial court and Court of Appeals found only one cause" (Resp. Br. 2) totally ignores what the Court of Appeals actually decided. It is entirely understandable that the Court of Appeals should have deemed to be clearly erroneous a finding that a Carpenters' strike for 11 working days caused a 33-day delay in completion, but that a 3-day Laborers' strike which immediately preceded it caused no delay whatsoever. The Court was also justifiably skeptical ("perhaps") of a likewise unexplained finding that excess overtime for electricians was caused entirely by a Carpenters' strike, and not at all by the substantial deviation from targeted efficiency standards by electricians. Respondent's elaborate effort to rehabilitate the trial court's finding that there was but one cause for the delay cannot alter the present legal posture of the case which is that the Court of Appeals has decided that this is a multiple causation case but that the defendant is nevertheless not entitled to an apportionment of damages. Petitioners have thus been mulcted for damages for injuries not caused by their violation of § 303, a result which defeats the Congressional policy in enacting § 303 (Pet. 14, 15, 20, 22-23), and is admittedly contrary to this Court's precedents.

II.

What respondent's lengthy discussion of the testimony and exhibits *does* demonstrate is the patent insufficiency of the trial court's conclusory findings. Respondent thereby invites this Court, as it did the Court of Appeals, to examine the voluminous evidence and to take it on faith that the trial court credited all the cited testimony, drew the inferences urged by respondent, and ignored all contrary evidence in the record . If the specificity requirements of Rule 52(a) had been met, this would be unnecessary; indeed, if the trial court had subjected itself to the discipline of making particularized findings on the basis of the evidence, it might well have entered a far lower damage award.

Respondent asserts that the adequacy of the findings was not challenged in the Court of Appeals prior to the petition for rehearing (Resp. Br. 1-2, n. 1, 14). Respondent is in error; the point was made at the very outset of defendants' argument on damages (p. 48):

> "The District Court found that the strike caused recoverable damages in the sum of $914,823.54 (A. 37-38). Its determination is entirely conclusory, unaccompanied by any reasoned explanation particularizing the means used to reach this result. Its decision is therefore flawed at the threshold. For, '[u]nlike a jury, which may award damages without substantiation of its reasons for arriving at a certain amount, the district court in such a situation is obliged to set out the rationale behind its damage awards.' "

The remainder of that argument, while establishing (or so defendants believed) that the damage award

was clearly unsupportable on any basis, also provided an object demonstration that the evidence was so complex and voluminous, that the trial court's conclusory findings were wholly insufficient to achieve the purposes of Rule 52(a).

Respondent's defense "that the Findings of Fact of the trial court were specific and particular enough to provide Petitioners with the material for devoting 52 pages of a 101-page Brief to the damages questions in the Court of Appeals" (Resp. Br. 2, n. 1 cont.) is utterly specious; it was, of course, the record made at trial that provided the 'material" which necessitated the lengthy discussion; indeed, if the findings had been more specific, and had explained the basis, if any, of the trial court's resolution of the disputed items, the task of counsel as well as of the reviewing court would have been greatly simplified. As Judge Waterman wrote in *Fuchstadt* v. *United States*, 434 F.2d 367, 370 (C.A.2):

> "While '[t]he nature and degree of exactness of the findings required depends on the circumstances of the particular case,' *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 419, we think that in tort actions for damages the pertinent consideration entering into the award as well as the amount allowed for each item should be stated briefly and clearly 'so that the appellate court can properly appraise the elements which entered into the award. * * * Without this information the defendant is unable properly to exercise the appellate rights conferred by statute and the court is equally unable to make appropriate appellate review.' *Alexander* v. *Nash-Kelvinator Corp.*, *supra*, 261 F.2d [187] at 191."

The Court of Appeals could have determined that defendants had sufficiently shown that on any view of

the record, the disputed elements of the damage award (in addition to the disapproved causation finding, see pp. 1-2 *supra*) were "clearly erroneous", or based on an error of law. It also could have remanded for further findings. But it could not properly sustain findings of which, because Rule 52(a) was not complied with, it was "unable to make appropriate appellate review" (*id.*).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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